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NO. 89-1363

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

- vs -

DARLINA K. FRANCE,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

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- vs -

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Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The defendant, DARLINA K. FRANCE, through counsel, moves this Court for permission to proceed in forma pauperis. This motion is based on the attached declaration of counsel.

DATED: Honolulu, Hawaii, April 2, 1990.

MICHAEL R. LEVINE
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Room 7102, 300 Ala Moana Blvd.
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Attorney for Respondent
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Respondent.

DECLARATION OF COUNSEL

I, MICHAEL R. LEVINE, declare as follows:

1. I am the Federal Public Defender for the District of Hawaii.

2. Pursuant to the Criminal Justice Act 18 U.S.C. § 3006A, I have been representing the respondent Darlina K. France on appeal.

3. That to the best of my knowledge respondent continues to qualify for appointed counsel under the Act and is eligible to proceed in forma pauperis.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

DATED: Honolulu, Hawaii, April 2, 1990.

MICHAEL R. LEVINE
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CERTIFICATE OF SERVICE

I, RUTH G. FULLERTON, hereby certify that a true and exact copy of the foregoing document was duly mailed, postage prepaid to the following offices:

KENNETH W. STARR
Solicitor General
Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

DATED: Honolulu, Hawaii, April 2, 1990.

RUTH G. FULLERTON
Legal Secretary to

MICHAEL R. LEVINE
Federal Public Defender
District of Hawaii

Attorney for Respondent
DARLINA K. FRANCE

NO. 89-1363

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

- vs -

DARLINA K. FRANCE,

Respondent.

BRIEF FOR RESPONDENT DARLINA K. FRANCE
OPPOSING PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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ISSUE PRESENTED

Should this Court grant certiorari to review United States v. France, 886 F.2d 223 (9th Cir. 1989) which held that a "solid wall" of Ninth Circuit precedent rendered futile any objection by France to jury selection by a magistrate?

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NO. 89-1363

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

- vs -

DARLINA K. FRANCE,

Respondent.

BRIEF FOR RESPONDENT DARLINA K. FRANCE OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-12a)[1] is reported at 886 F.2d 223.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1989, and the government's petition for rehearing, as well as a suggestion for rehearing en banc, was denied on January 16, 1990. [Pet. App. 15a] Jurisdiction is invoked by the government under 28 U.S.C. § 1254(1).

1 "Pet. App." refers to the appendix to the government's petition.

STATEMENT OF FACTS AND PROCEDURE

1. The Facts

Because the government's statement of facts is seriously deficient and misleading, [Pet. at 2-3], France summarizes the omitted facts as follows:

In December, 1986, Mr. and Mrs. France lived in the Aliamanu military housing area on Oahu, Hawaii together with their two children. According to Mr. France's trial testimony, after a heated domestic argument with the respondent, his wife Darlina France, he started "beating the hell out of her." [Tr. 52, 73] He "grabbed ahold of her throat," and "slammed her up side [sic] the head." Then, he "threw her down on the floor, picked her back up and threw her back again, and slammed her up [sic]." [Tr. 53] Finally, he "threw her down" on broken glass on the floor. [Tr. 54] Mr. France had engaged in brutally assaultive behavior before, having put a former wife in the hospital. [Tr. 73, 310] Mrs. France was particularly vulnerable to this type of violence, since she had been repeatedly and seriously abused by a former husband in a prior marriage [Tr. 73, 309], whom she once shot at to stop his repeated beatings. [Tr. 310, 311]

After the brutal beating by her husband, and believing she would continue to be beaten, [Tr. 345, 353] Mrs. France shot her husband Mr. France in the shoulder with a gun he had given her earlier. Immediately after the shooting, Mrs. France showed great remorse. She rushed over to Mr. France and stated, "Oh my God, I shot you. I didn't mean to." [Tr. 61, 71, 101] She told her daughter to call an ambulance, [Tr. 100, 151, 157] and she begged her husband's forgiveness. [Tr. 61, 71, 101, 151, 157] She later visited Mr. France in the hospital and told him she was "very sorry." [Tr. 63] Mr. France believed his wife; he also believed that the shooting was accidental. [Tr. 64, 67, 201,

205] Mr. France testified that previously he himself had accidentally fired the gun and almost shot himself in the leg, and that the gun had a very light trigger pull. [Tr. 64, 70]

After Mr. France was released from the hospital he resumed living with Mrs. France without incident. [Tr. 63, 79] Mrs. France was assisting Mr. France with his therapy. [Tr. 77, 87] They had a good relationship [Tr. 79], loved each other and were going to stay together. [Tr. 320] Mr. France did not file charges against Mrs. FRANCE and, in fact, requested that she not be prosecuted. [Tr. 79, 201] Notwithstanding the plea of Mr. France not to prosecute his wife, the government charged Mrs. France in Count I with assault with intent to commit murder in violation of 18 U.S.C. § 113(a), and in Count II with assault resulting in serious bodily injury, in violation of 18 U.S.C. § 113(f). Finally, it charged her in Count III with using a firearm during commission of a crime, in violation 18 U.S.C. § 924(c) which, upon conviction, carries a mandatory consecutive five-year sentence without possibility of probation or parole. After a jury trial France was convicted on Count I of the lesser offense of assault with a dangerous weapon in violation of 18 U.S.C. § 113(a), and was found guilty as charged on Counts II and III.

At sentencing before the Honorable Robert J. Kelleher, Mr. France, through written correspondence, urged that his wife not be sent to prison [S.Tr. 15].[2] Judge Kelleher "expressed hostility" to the statute's requirement that he sentence France to the mandatory five-year sentence without parole. France, 886 F.2d at 225, Pet. App. 4a. He said her case did not warrant such a sentence. Id. He said the statute had relegated him to only a "pro forma" performance and that he "might as well go fishing on

2 "S.Tr." refers to the sentencing transcript.

the day of sentence and ask the clerk to pronounce sentence." Id. However, the court felt required by the mandatory penalty provision of 924(c) to impose a five-year sentence without parole on Count III, and he did so.

In France, the Ninth Circuit agreed with Judge Kelleher's views as to the inappropriateness of separating France from her husband and her two children for five years. Furthermore, the court thought that the government's prosecution of France under the five-year mandatory penalty provision of 924(c) was so heartless that it cited to the government Portia's speech on the quality of mercy from Shakespeare's The Merchant of Venice. France, 886 F.2d at 228; Pet. App. at 11a-12a.

2. Procedure Pertaining to Jury Selection

Before France's trial took place, the Ninth Circuit had twice ruled, without dissent, that, regardless of defense objection, magistrates could select a jury in a felony case. The two decisions were United States v. Peacock, 761 F.2d 1313 (9th Cir.)(Kennedy, J.), cert. denied, 474 U.S. 847 (1985), and United States v. Bezold, 760 F.2d 999 (1985), cert. denied, 474 U.S. 1063 (1986). Bezold was litigated by current counsel for France, Michael R. Levine.

After Bezold and Peacock, as the government concedes, it was the "regular practice" of the District of Hawaii to have magistrates select the jury in "virtually all" cases [Pet. at 3,7]. Therefore, when France's jury selection began, her trial counsel made no objection because any objection would have been futile. France, 886 F.2d at 228 (objection "clearly futile"). Indeed, in the Ninth Circuit the raising of meritless objections can be grounds for severe sanctions. See In Re Becraft, 885 F.2d 547 (9th Cir. 1989) (criminal defense lawyer fined $2,500 for

filing frivolous petition for rehearing raising arguments repeatedly rejected by the court). Significantly, however, neither defense counsel nor France gave affirmative consent to the procedure.

After her conviction, France received concurrent terms of probation on each of the two assault charges, but she was sentenced to the five-year mandatory sentence on the 924(c) charge. On appeal, she challenged only the 924(c) conviction. Continuing to believe that raising the magistrate issue would be futile in view of the solid wall of contrary Ninth Circuit authority, France omitted it from her brief to the Ninth Circuit. After oral argument, while the decision in France was pending, this Court decided Gomez v. United States, 109 S. Ct. 2237 (1989).

In Gomez this Court did not reach the constitutional issues but unanimously held that a magistrate has no jurisdiction to preside over jury selection because Congress had not authorized this power. Moreover, even though the defendant in Gomez could show no prejudice, the Court held that, because the defendant had a "basic" right to have a person with jurisdiction preside over a "critical" stage of his trial, harmless-error analysis could "never" be applicable. Gomez, 109 S. Ct. at 2248.

Within three weeks of the Gomez decision, while the appeal in France was still pending, France moved the court of appeals to reverse her conviction because a magistrate had selected the jury. After receiving supplemental briefs, the court reversed France's conviction. It held, first, that Gomez should be applied retroactively to France's case because it was pending on direct appeal.[3] The court then held that France had

3 The government does not take issue with this aspect of the holding. [Pet. at page 4, n.2]

not waived her right to raise the Gomez claim by her failure to object in the district court for two reasons. First, no objection was necessary because Gomez did not require an objection.[4] Second, and most importantly, however, the court held that in view of the Ninth Circuit's "solid wall" of precedent authorizing magistrate voir dire even over a defendant's objection, any objection would have been futile. The court reasoned that requiring a futile objection would be senseless because it would encourage "defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned." France 886 F.2d at 228 (quoting Guam v. Yang, 850 F.2d 507, 512 n.8 (9th Cir. 1988) (en banc).

Finally, citing this Court's language in Gomez, the court of appeals reasoned that the rule announced in Gomez "touches on one of the most basic rights of the accused," France at 228, the right to have an Article III judge preside at jury selection, a "critical" stage of her trial. France, 886 F.2d at 226 (quoting Gomez at 2248). In view of the importance of the right and in view of the "solid wall" of Ninth Circuit precedent which, until Gomez, had authorized the procedure violative of that right, the court in France held that it would be "at best unseemly, and at worst irresponsible" to penalize France for failing to object. France, 886 F.2d at 228.

4 The court of appeals held that Gomez announced a "broad, definitive rule" not dependent upon an objection. France, 886 F.2d at 227. The court of appeals recognized that this Court had referred to the existence of an objection in Gomez, but believed that the Court's holding did not turn on this point. Id.

ARGUMENT

1. Certiorari is not justified because France rests on the well recognized doctrine that futility excuses a failure to object and therefore creates no conflict among the circuits.

Certiorari should be denied in this case because France rests primarily on the Ninth Circuit's unremarkable holding that France's objection to the magistrate's conducting voir dire would have been futile. The court in France pointed to the two previous Ninth Circuit holdings which approved magistrate voir dire even over objection of defense counsel: United States v. Bezold, 760 F.2d 999 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986) and United States v. Peacock, 761 F.2d 1313 (9th Cir.) (Kennedy, J.), cert. denied, 474 U.S. 847 (1985). Because it rests on the doctrine of futility, the holding in France does not conflict with that of any other circuit, as grudgingly conceded by the government. See Pet. at 17 ("the 'futility' issue is not squarely presented by a case from any other circuit . . . .") Certiorari cannot, therefore, be justified on the ground that France creates a conflict among the circuits.

Indeed, France has been expressly distinguished by at least two other circuit courts on the ground that it relied on a "solid wall" of authority in the Ninth Circuit which did not exist elsewhere. See United States v. Lopez-Pena, 890 F.2d 490, 497 (1st Cir. 1989) ("[I]n this circuit, unlike in the Ninth, there was no 'solid wall of circuit authority'" which would render the objection futile), reh'g granted, February 9, 1990; United States v. Musacchia, slip. op. no. 88-1491 (2d Cir. March 21, 1990) at pages 18-21 (same).

The government urges that certiorari should be granted because the Ninth Circuit erred in applying the futility doctrine to the instant case. It argues, first, that there is reason to doubt whether futility "ever" justifies a failure to object in the district court. [Pet. at 11] In any event, it argues, the

doctrine was improperly applied here because Bezold and Peacock did not require magistrates to conduct voir dire, but only permitted them to do so even over defense objection.ground.[5]

Even assuming, arguendo, that the Ninth Circuit did err in applying the futility principle, which, as will be shown below, it did not, the government, in effect, asks this Court to grant certiorari merely to correct the Ninth Circuit's error. [Pet. at 11-13] This Court, however, has admonished that it "must never forget that this Court is not a forum for the correction of errors." Boag v. MacDougall, 454 U.S. 364, 367 (1982) (Rehnquist, J., dissenting); see Watt v. Alaska, 451 U.S. 259, 275, n.5 (1981) (Stevens, J., concurring) ("our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases"); cf. Butler v. McKellar, 110 S. Ct. 1212, ___ (1990)(Brennan, J., dissenting) (the court will generally not grant certiorari just because decision below may be erroneous). Thus, certiorari is not justified merely to correct the alleged error in France.

Moreover, the Ninth Circuit did not err in invoking the futility doctrine, for, contrary to the government's assertions, futility is a well recognized principle for excusing a failure to object. See Ohio v. Roberts, 448 U.S. 56, 74 (1980) ("the law

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5 The government's position in this brief is inconsistent with that taken in its brief opposing certiorari in United States v. Mang Sung Wong, 884 F.2d 1537 (2d Cir 1989), cert. denied, 110 S. Ct. 1140 (1990), pet. for reh. pending. In the instant case the government argues that certiorari should be granted because an objection was not necessarily futile; yet in Mang Sung Wong, it successfully argued against certiorari by distinguishing France on the ground that in France an objection would have been futile. Gov't. Br. in Mang Sung Wong, Appendix A, at page 6, n.2. Having gained success arguing the first position, the government should not now be heard to argue the second merely to gain another success. See Jett v. Zink, 474 F.2d 149, 155 (5th Cir. 1973) (having successfully taken one position before the court, a party may not take an inconsistent point to gain another success); Russell v. Rolfs, 893 F.2d 1033, 1037-1038 (9th Cir. 1990)(judicial estoppel prohibits the state from arguing one position in federal court and an inconsistent position in state court).

does not require the doing of a futile act"); Miranda v. Arizona, 384 U.S. 436, 495 n.69 (1966) ("failure to object at trial does not constitute a waiver of claim if no objection available"); Grosso v. United States, 390 U.S. 62, 70-71 (1968) (in view of law at the time of trial, counsel's failure to raise issue below is excused).

Indeed, the futility doctrine has long been applied by the circuit courts in a variety of procedural contexts to excuse counsel's failure to object or raise an issue below. See United States v. Byers, 740 F.2d 1104, 1109, n.6 (D.C. Cir. 1984) (Scalia, J.) (failure to object excused because counsel "could well have thought the objection futile" in view of existing law); Ingber v. Enzor, 841 F.2d 450, 454-55 (2d Cir. 1988) (defendant not required to pursue futile course); Guam v. Yang, 850 F.2d 507, 512 n.8 (9th Cir. 1988) (en banc) (failure to object to jury instruction not waiver where objection futile in view of circuit law); cf. Callanan v. United States, 881 F.2d 229, 231 (6th Cir. 1989)(fact that issue "appeared" to be settled constituted cause for not raising it).[6]

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6 See also United States v. Indiviglio, 352 F.2d 276, 280, n.7 (2d Cir. 1965) ("appellate courts often notice error not objected to below when, under the law existing at the time of trial, objection would have been futile . . . "); United States v. Fay, 333 F.2d 12, 16 (2d Cir. 1969) (en banc) (failure to object to admission of evidence not waived where futile under existing law), aff'd, 381 U.S. 654 (1965); Smith v. Estelle, 602 F.2d 694, 708 n.19 (5th Cir. 1979), aff'd. 451 U.S. 454 (1981) (Sixth Amendment issue considered on appeal, although not raised at trial because of surprise and apparent futility in raising point); United States v. Liguori, 438 F.2d 663, 665 (2d Cir. 1971) (failure to raise issue of unconstitutionality of statutory presumption, where only one circuit had so held, was "futile"); O'Connor v. New Jersey, 405 F.2d 632, 634 n.2 (3d Cir.) ("considering the law at the time of [the defendant's] trial, it would have been a futile gesture" to have objected to the evidence), cert. denied, sub nom. O'Connor v. Yeager, 395 U.S. 923 (1969).

In the face of the foregoing authority, the government argues, alternatively, that the futility doctrine can be applied only where the trial court's action was "compelled" by controlling circuit authority. [Pet. at 11] This is clearly not the law, however, because the futility of an objection can arise from the reasonable perception of counsel as to the prevailing law or the prevailing practice of the court. As then Judge Scalia wrote for the majority while on the District of Columbia Circuit, "counsel could well have thought the objection futile" in view of the existing law. United States v. Byers, supra, 740 F.2d at 1104, n.6 (emphasis added); see Watt v. Page, 452 F.2d 1174, 1175 (10th Cir.), cert. denied, 405 U.S. 1070 (1972) (where trying prisoner in jail clothes was court's "common practice," failure to object was futile); United States v. Rivera, 513 F.2d 519, 526 (2d Cir. 1975) (no waiver where defendant "could have considered objection futile so far as district judge or this court was concerned"); United States v. Clark, 475 F.2d 240, 247, n.6 (2d Cir. 1973) (failure to object to defendant's absence did not waive sixth amendment violation, because an objection "may have appeared [to counsel] to be futile"); cf. Callanan v. United States, supra, (where issue "appeared" to be settled, counsel showed "cause" for not raising it).

Moreover, in the instant case, the government concedes that the "regular practice" in the district of Hawaii was to have magistrates conduct jury selection in "virtually all" cases. [Pet. at. 3,7] This regular practice of the District of Hawaii corroborates the Ninth Circuit's conclusion respecting futility. Yet more corroboration is found in United States v. Baron, 721 F. Supp. 259 (D. Haw. 1989), appeal pending, where the Hawaii District Court found that objection by present counsel to the magistrate's conducting jury selection would have been futile. In reaching its conclusion, the Court found that "this very same

defense counsel [Michael R. Levine] has objected to this practice [magistrates selecting the jury] in other cases and has appealed the denial of such objection without success." Id. at 262.

In view of the Ninth Circuit precedent, the District of Hawaii regular practice, and the futility of past efforts to object to magistrate selected juries, it would make little sense to require counsel to continuously "burden district courts with repeated assaults on this established principle." United States v. France, 886 F.2d at 228 [Pet. at 10a]; see Ingber v. Enzer, supra, 841 F.2d at 454 (no value in encouraging futile "appeal of even well settled points of law"); Callanan v. United States, supra, (same). This is especially true where such assaults could be deemed frivolous and result in substantial loss of credibility, not to mention serious sanctions. See In Re Becraft, supra at 6.

Notwithstanding the abundant authority to the contrary cited above, the government argues that futility can never excuse the failure to object. It relies on a statement in Engle v. Isaac, 456 U.S. 107, 128 (1982), that "the futility of presenting an objection to the state courts cannot alone constitute cause for failure to object at trial." Reliance on this statement, out-of-context, is misplaced, because the government compares apples to oranges. It may be true, as set forth in Engle, that for a person in "state" custody who is raising a non-jurisdictional claim on habeas corpus, futility does not establish "cause" under the "cause and prejudice" test. This futility doctrine, however, arises in state habeas corpus cases because there is a legitimate concern of comity between state and federal systems. As stated in Engle v. Isaac:

> [T]he Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for

> vindicating constitutional rights. Federal intrusion into state criminal trials frustrate both the States' sovereign power to punish offenders . . . .

Id. at 128. Clearly the state-federal comity concerns of Engle have no application to the case at bar because the particular futility doctrine set forth in that case, unlike the doctrine relied on in France, was established so that a defendant in state custody "may not bypass the State Courts" Id. at 130 (emphasis added). Therefore, the Engle doctrine is simply inapplicable here.

In sum, the Ninth Circuit correctly held that in view of the circuit precedent as well as the uniform practice of the District of Hawaii, any objection by France to having a magistrate select her jury would have been futile.[7] This unremarkable holding, in reality, is nothing more than a reasonable application of the well settled doctrine of futility; consequently, certiorari is not justified.

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7 The government cites one case in the Ninth Circuit in which, according to the government, a defendant's objection to magistrate-conducted voir dire persuaded a district judge to conduct jury selection himself: United States v. Rewald, Cr. 84-02417 (D. Haw. 1984). [Pet. at 12] That case, however, does not support the government because, although there was a defense objection, it was the government's objection that persuaded the district court to select the jury. Although that objection is obviously not part of the record in this case, present counsel, who was also trial counsel for Rewald, see United States v. Rewald, 889 F.2d 836, 859, notes 20 and 23 (9th Cir. 1989), certifies to this Court that such an objection was made. This can be easily verified by the Solicitor General by calling the Hawaii Assistant United States Attorney who made it, Mr. John Peyton at FTS 551-2580.

2. The impact of France on the criminal justice system is not as significant as the government suggests, and, in any event, is a result of the government's own policy.

The government also argues that certiorari should be granted because of the "large number" of cases that will be reversed in Hawaii "and elsewhere." [Pet. at 8] It points to the declaration of the Hawaii United States Attorney that, in Hawaii, 27 cases involving 48 defendants could be affected, assuming that each defendant seeks a new trial. [Pet. at 7-8, App. 13a] Furthermore, the government surmises that "there are many defendants from all over the country who did not object to magistrate's conducting voir dire and are thus in the same position as respondent." [Pet. at 7]

First, the government need not be concerned with the defendants from "all over the country" because it is only in the Ninth Circuit where a failure to object to a magistrate's selection of a jury has been excused by its futility.[8] Therefore, the government's fears that a great number of convictions outside the Ninth Circuit will be affected are unfounded. Moreover, even in the Ninth Circuit, the 48 federal convictions that could be affected by France, even assuming that each defendant seeks a new trial, represent only approximately one-tenth of one percent of the total number of convictions in the Ninth Circuit since 1984.[9] This does not suggest as great an

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8 See United States v. Lopez-Pena, supra, 890 F.2d at 497 (objection not futile, unlike in Ninth Circuit); United States v. Wey, 895 F.2d 429 (7th Cir. 1990) (futility not raised); United States v. Mang Sun Wong, supra, (futility not raised); United States v. VanWort, 887 F.2d 375 (2d Cir. 1989) (futility not argued), pet. for cert. pending No. 89-6313; Government Of The Virgin Islands v. Williams, 892 F.2d 305 (3d Cir. 1989) (futility not raised), pet. for cert. filed, No. 89-6855, March 5, 1990; United States v. Musacchia, supra at slip op. pages 18-20 (unlike in Ninth Circuit, objection not futile).

9 There were approximately 6,300 criminal convictions that were appealed in the Ninth Circuit during the period from June 1987 to June 30, 1988. See, 1988 Annual Report of the Director of the Administrative Office of the United States Courts at page 144. Assuming, conservatively, that there were only 5,000

impact on the federal justice system as the government fears.

In any event, the government has no one but itself to blame for any new trials that may occur. In the case at bar, as in other cases, it chose not to object to the magistrate's selection of a jury. Had it done so, as it did in the Revald case, see n.7 supra, it is likely that the issue in the case at bar would not have arisen.[10] The government should not now be heard to complain to this Court about the consequences of its own policy.

3. Because the issue of "plain error" is not raised in the case at bar, certiorari is not warranted to decide that question.

The government urges this Court to grant certiorari to decide the additional question whether a magistrate's selection of the jury was "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure. [Pet. at 13,17] France agrees that, in the abstract, this is an interesting post-Gomez question that has spawned divergent views; however, the instant case simply does not raise it. Contrary to the government's inexplicable assertion in the last paragraph of page 13 of its petition, France never raised the issue on appeal, nor did the Ninth Circuit ever address much less decide it.

The government concedes, as it must, that France "does not expressly rest its judgment on [plain error grounds]." [Pet.

(cont'd)

convictions appealed during each of the years 1984, 1985, 1986, 1987, 1988, and 1989, the total number of convictions appealed was approximately 30,000. Forty-eight divided by 30,000 equals .16%.

10 See Government's petition for writ of mandamus filed in In Re United States (Carpenter) No. 90-3002 (2d Cir. Jan. 9, 1990). In that post-Gomez case, the defendant consented, but the government objected, to magistrate's voir dire, and it filed a writ of mandamus to the Second Circuit to order the district judge to conduct jury selection anew. After the writ was filed, the district court was persuaded to conduct the jury selection anew, and the petition for the writ was withdrawn; see also Government of Virgin Islands, supra, 892 F.2d at 306 (government did not object to jury selection by the magistrate).

at 13, n.11] Nevertheless, it argues, in effect, that the court in France implicitly rested its judgment on that ground. This is an inconsistent argument, however, because in its petition to the Ninth Circuit for rehearing en banc, the government argued that the court had "ignored" Rule 52(b) altogether. Appendix B at page 10. In view of the government's contradictory arguments, the court should view the government's latest position with skepticism. See also n.5 supra (government should not be heard to argue inconsistent positions).

In any event, the latest reasoning of the government is flawed because it assumes that "plain error" is the only means whereby the court in France could have reached an issue not raised in the district court. This assumption is plainly wrong because this Court has held that "the matter of what questions may be taken up and resolved for the first time on appeal is one left to the discretion of the court of appeal, to be exercised on the facts of individual cases." Singleton v. Wulff, 428 U.S. 106, 120, (1976) (emphasis added); see Grosso v. United States, supra, 390 U.S. 62 at 70-71 (Court has discretion under 28 U.S.C. § 2106 to decide issue not raised below); In Re Howell, 731 F.2d 624, 627 (9th Cir. 1984) ("[R]ule of waiver is one of discretion rather than jurisdiction"), cert. denied, 419 U.S. 933 (1984). Indeed, the government's assumption is directly refuted in Grosso, supra. In that case, this Court, like the Ninth Circuit in France, exercised its discretion to review a legal issue not raised below precisely because of the apparent futility of raising it in light of the prevailing law. Significantly, this Court reached the issue even though the Court held that the failure to raise the issue below did not amount to "plain error." Grosso, supra, 390 U.S. at 70-71.

In short, regardless of the "plain error" doctrine, in the exercise of their discretion, appellate courts, as in France,

> often excuse a litigant's failure to object when at that time it would have been futile to do so, but a substantial change in or clarification of the law occurs in the litigant's favor after final judgment in the trial court.

United States v. Byers, 740 F.2d 1104, 1132 (D.C. Cir. 1984) (Robinson J., concurring); see id. at n.52 & n.53 (collecting cases); United States v. Whitten, 706 F.2d 1000, 1012 (9th Cir. 1983) (same), cert. denied, 456 U.S. 1100.[11]

With respect to the case at bar, this Court's unanimous decision in Gomez was decided while the case at bar was pending appeal. Gomez reversed two Ninth Circuit cases, one of which was litigated by present counsel, which had approved jury selection by a magistrate over a defendant's objection. Therefore, regardless of "plain error," in view of the "substantial change" in law brought about by Gomez, see Byers supra, there was nothing remarkable about the Ninth Circuit's having excused France's failure to raise the jury selection issue below. See France, 886 F.2d at 228 (France should not be penalized because she "did not guess that the law would change some time after the error was committed.")

In sum, the government's suggestion to the contrary notwithstanding, the case at bar does not raise the "plain error" issue. Hence, in effect, the government asks this Court to grant certiorari merely to render an advisory opinion, which this Court has long "refused" to do. Mistretta v. United States, 109 S. Ct.

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11 In their discretion appellate courts will also decide an issue not raised below if it is "purely one of law and does not effect or rely on the factual record." Whitten, supra, 706 F.2d at 1012; United States v. Hayden, 860 F.2d 1483, 1485 (9th Cir. 1988) (although government did not raise issue below, because it is purely legal, court of appeals will decide it).

647, 661 (1989); see California v. Freeman, 109 S. Ct. 854, 856 (1989); Walters v. National Association of Radiology Services, 473 U.S. 305, 345-46 (1985). Accordingly, the Court should deny certiorari to the case at bar and grant it, instead, to a pending or future case that does raise the "plain error" issue.[12]

CONCLUSION

The government acknowledges that France creates no conflict among the circuits because it rests on the doctrine of futility. Nevertheless, it argues that certiorari should be granted to resolve the question of whether futility excuses lack of objection and whether "plain error" applies. These arguments are unpersuasive because the futility doctrine is a well recognized principle which excuses a failure to object. Hence, the issue does not raise an important question justifying certiorari. Moreover, even assuming, arguendo, that the doctrine was applied erroneously, this Court does not grant certiorari merely to perform an error correcting function. Finally, the issue of "plain error" is not even raised much less decided in France; consequently, the second argument for granting certiorari has no force.

In sum, therefore, certiorari should be denied.

DATED: Honolulu, Hawaii, April 2, 1990.

MICHAEL R. LEVINE
Attorney for Respondent
Darlina K. France

12 See E.g., United States v. Wey, 895 F.2d 429 (7th Cir. 1990) (plain error issue raised and decided); United States v. Musacchia, supra at slip op. page 23 (plain error issue raised and decided); United States v. Mang Sung Wong, supra 884 F.2d at 1544-45 (same).

APPENDIX A

No. 89-5949

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MANG SUN WONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

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QUESTION PRESENTED

Whether petitioner's convictions must be reversed because a magistrate presided over jury selection at his trial even though petitioner expressly consented to that procedure.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-23A) is reported at 884 F.2d 1537.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1989. A petition for rehearing was denied on September 5, 1989. Pet. App. 19A-23A. The petition for a writ of certiorari was filed on November 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of

conspiracy to possess with intent to distribute more than one kilogram of heroin, in violation of 21 U.S.C. 846, and of attempted possession with intent to distribute more than one kilogram of heroin, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to ten years' imprisonment. The court of appeals affirmed, Pet. App. 1A-23A.

1. On May 18, 1987, petitioner and his counsel appeared before a magistrate for jury selection. Before petitioner and his codefendants arrived, the magistrate told petitioner's counsel that "a defendant is entitled to a trial before an Article 3 Judge." Pet. App. 26A. The magistrate then told counsel that "[i]t's been the practice in this Court to have Magistrates select the juries in many criminal cases," and that the court of appeals had approved the practice "in a case in which the [court of appeals] deemed it a waiver because no objection was made to the Magistrate for jury selection." Ibid. The magistrate then told counsel that he would give them the opportunity to discuss the issue with their clients because, the magistrate stated, he intended "to question them and take a waiver on the record." Pet. App. 26A-27A. The magistrate then directly asked counsel whether "[a]ny lawyer here now * * * would object to a Magistrate selecting a jury?" Petitioner's counsel replied "No." Pet. App. 27A.

After a recess, petitioner and his counsel appeared for jury selection. At that time, petitioner's two codefendants elected to plead guilty. The magistrate then dismissed the jury panel

from the courtroom and asked petitioner's counsel whether he had discussed with his client if he objected to the magistrate's conducting jury selection. Pet. App. 43A. When counsel replied that he had not, the magistrate instructed counsel to discuss the issue with his client. After consulting with his client, petitioner's counsel stated that petitioner understood the issue and waived his right to jury selection by a district judge. The magistrate then asked petitioner personally whether he had discussed the issue with his lawyer. Petitioner replied that he had. The magistrate asked petitioner if he was willing to have the magistrate conduct jury selection, and petitioner again assented. Pet. App. 43A-44A.

2. The court of appeals initially affirmed petitioner's conviction based on its decision in United States v. Garcia, 848 F.2d 1324 (2d Cir. 1988), in which it had held that a magistrate could delegate jury selection to a magistrate even absent the defendant's consent. The court added, however, that petitioner's "consent renders this claim meritless." Pet. App. 18A-19A.

After this Court reversed the Garcia decision in Gomez v. United States, 109 S. Ct. 2237 (1989), petitioner filed a petition for rehearing claiming that the decision in Gomez required reversal of his conviction. The court of appeals denied the petition. Pet. App. 19A-23A. It held that this Court had limited its holding in Gomez to cases in which the magistrate conducts jury selection over the defendant's objection.

Judge Altimari dissented. Pet. App. 22A-23A. He argued that "the consent of the defendant cannot enlarge those powers of office not granted by the Federal Magistrates Act." Id. at 23A.

ARGUMENT

Petitioner contends (Pet. 9-17) that, even though he expressly consented to the supervision of jury selection by the magistrate, he is entitled to reversal of his convictions under the Gomez decision. That contention is without merit.

1. In Gomez, the Court framed the issue before it as "whether [a magistrate's] presiding at the selection of a jury in a felony trial without the defendant's consent is among" the duties that the Magistrates Act empowers magistrates to perform. 109 S. Ct. at 2239 (emphasis added). The Court held that the statute does not authorize that procedure. The Court further ruled that the error could not be deemed harmless when "despite the defendant's objection, and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury." 109 S. Ct. at 2248 (emphasis added). Accordingly, as the court of appeals found, this Court explicitly limited the reach of its holding to situations in which the district court delegated jury selection to a magistrate over the defendant's objection. The Gomez decision does not require the reversal of a conviction where the defendant consented to the magistrate's conducting voir dire. 1/

1/ This Court often has held that a defendant may waive important constitutional rights. For example, the Court has held

(continued...)

Petitioner also argues (Pet. 14-17) that his consent was not knowing and voluntary, and that it was coerced by the presence of the jury panel in the courtroom. In fact, however, the magistrate directed petitioner's counsel to discuss the issue with petitioner after the panel had been dismissed. See Pet. App. 43A. After counsel had done so, he stated that petitioner understood the issue and consented to the magistrate's supervision of jury selection. Despite counsel's representation, the magistrate was careful to ask petitioner personally whether he had discussed the issue with his counsel and understood his right to be tried before a district judge. Under those circumstances, petitioner's consent was knowing and voluntary.

2. Petitioner contends (Pet. 9-10) that the supervision of jury selection by a magistrate is a "jurisdictional defect" in the sense that such an error may never be waived or cured by consent. That contention misapprehends this Court's use of the term "jurisdiction" in Gomez.

In Gomez, this Court held that the error under the Magistrates Act was not harmless because a defendant has a basic right "to have all critical stages of a criminal trial conducted

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1/ (...continued)
that a defendant may waive the right to be free from compulsory self-incrimination, see Garner v. United States, 424 U.S. 648, 654 n.9 (1976), the right to counsel, see Adams v. United States ex rel. McCann, 317 U.S. 236, 275 (1942), and the right to a speedy trial. See Barker v. Wingo, 407 U.S. 514, 525-528 (1972). Indeed, a defendant can plead guilty and waive his right to trial at all. We know of no reason why the statutory right to have a district court preside at jury selection should be given special status that would preclude its waiver.

by a person with jurisdiction to preside." 109 S. Ct. at 2248. In context, the Court's use of the term "jurisdiction" appears to refer to the trial court's statutory authority -- i.e., that the district court had no authority under the Magistrates Act to refer jury selection to a magistrate. See also United States v. Rodgers, 466 U.S. 475, 479-480 (1984) (defining "jurisdiction" in 18 U.S.C. 1001 to mean "official, authorized functions"); cf. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 395 (1982) (holding that time limit for filing Title VII claims could be waived or tolled even though Court had earlier termed the requirement "jurisdictional"). It does not follow, therefore, that the district court lacked subject matter jurisdiction in this case to enter a judgment of conviction against petitioner. Nothing in Gomez even remotely suggests that the magistrate's supervision of jury selection divested the district court of the power to enter a binding judgment. As the Ninth Circuit noted in Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537, 543 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984), "the maxim that parties may not consent to the jurisdiction of federal courts * * * applies only where the parties attempt to confer upon an Article III court a subject matter that Congress or the Constitution forbid[s]." 2/

2/ Petitioner also claims that the decision of the court of appeals conflicts with the Ninth Circuit's decision in United States v. France, 886 F.2d 223 (1989). In France, however, the court held that a defendant did not waive a claim based on the Magistrates Act by failing to object to the magistrate's presiding at voir dire. The court held that such an objection
(continued...)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

JANUARY 1990

2/ (...continued)
would have been futile in light of settled Ninth Circuit precedent. By contrast, this case does not involve a mere failure to object; petitioner expressly consented to the magistrate's supervision of jury selection. Nor had the Second Circuit held that a defendant could not successfully object to a magistrate's conducting voir dire. At the time of petitioner's trial, the Second Circuit had held only that selection of a jury by a magistrate was not a plain error that required reversal in the absence of a contemporaneous objection. Indeed, the magistrate's solicitation of consent in this case is strong evidence that an objection would not have been fuitle. Thus, the decision in this case does not conflict with France.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 87-1282

UNITED STATES OF AMERICA,

Appellee

v.

DARLINA K. FRANCE,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

PETITION FOR REHEARING
WITH SUGGESTION OF REHEARING EN BANC

PRELIMINARY STATEMENT

On September 13, 1989, a panel of this Court (Nelson, Reinhardt, and Wiggins, JJ.) ruled that even in the absence of an objection, the delegation of jury selection to a magistrate is reversible error. Based on this decision, this Court already has reversed the felony convictions of five other defendants (see, infra, note 2), and 43 other convictions obtained in the District of Hawaii are in jeopardy. Moreover, the decision conflicts with United States v. Vanwort, Nos. 88-942-45 (2d Cir. Sept. 26, 1989). For these reasons, the need for en banc review of this decision is manifest. See Rule 35-1 of the Rules of this Court.

QUESTION PRESENTED

Whether a defendant who fails to object to the delegation of jury selection to a magistrate and thereafter informs the magistrate that she is satisfied with the manner in which jury selection is conducted waives the statutory right to have this portion of her trial conducted by an Article III judge.

STATEMENT

After a jury trial in the United States District Court for the District of Hawaii (Hon. Robert J. Kelleher), appellant Darlina K. France was convicted on one count of assault with a deadly weapon, in violation of 18 U.S.C. 113(a); assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(f); and using a firearm in relation to a crime of violence, in violation of 18 U.S.C. 924(c). She was sentenced to five years' imprisonment and three years' probation.

1. The evidence at trial showed that appellant shot her husband on a federal military reservation during an argument. Prior to trial, in accordance with the regular practice in the District of Hawaii, the district court assigned jury selection to a federal magistrate. Appellant did not object to this assignment either to the magistrate or the district court; nor did she request that a district judge conduct the voir dire. During jury selection, the magistrate sustained both objections that defense counsel raised to the questions asked of the prospective jurors. At the conclusion of jury selection, the magistrate asked the parties, "For the record, would you like--is there any objection

you'd like to make in the manner in which the jury was selected?" Defense counsel replied, "No, your honor." When trial began the next day, appellant again failed to object to the magistrate's supervision of jury selection or to any of the magistrate's rulings during jury selection.

2. Appellant appealed her conviction to this Court. Her initial brief on appeal challenged only her conviction under 18 U.S.C. 924(c). Appellant raised no issue concerning the selection of the jury by the magistrate.

While the appeal was pending, the Supreme Court decided Gomez v. United States, 109 S.Ct. 2237 (1989). In Gomez, the Court held that the Federal Magistrates Act, 28 U.S.C. 631-638, does not authorize district courts to delegate jury selection to magistrates and that the selection of a jury by a magistrate is not harmless when the defendant makes a timely objection. In a motion filed in this Court after the Gomez decision, appellant claimed for the first time that the district court committed error in delegating jury selection to a magistrate.

A panel of this Court reversed appellant's convictions. The Court first held (slip op. 11403-04) that Gomez should be applied retroactively "at least" to all cases pending on direct appeal at the time it was decided.[1] The panel then held (slip op. 11405-07) that appellant had not waived her right to appellate review of this issue by her failure to object below. First, the panel

[1] The government does not take issue with the Court's retroactivity analysis.

rejected the government's argument that the Court in Gomez had limited its holding to defendants who had objected to the delegation of jury selection to the magistrate in the district court. Slip op. 11405-06.

In any event, the panel held, no objection was necessary because circuit precedent had authorized magistrates to conduct voir dire in felony trials. Thus, according to the panel, appellant faced a "solid wall of circuit authority" that would have prevented the district court from correcting the asserted error and rendered any objection futile. Slip op. 11406. The panel noted that the "solid wall of circuit authority" rule previously had been used only to excuse a defendant's failure to object to a jury instruction. It reasoned, however, that the rule announced in Gomez "touches on one of the most 'basic rights' of the accused, the right to a fair and accurate trial." Slip op. 11407. Therefore, the Court found, it would be "unseemly" to penalize a defendant for failing to object. Ibid.

REASONS FOR GRANTING THE PETITION

The panel's decision ignores the basic principle that a defendant who fails to object to an error during trial may obtain reversal based on that error only if it rises to the level of plain error. Moreover, in excusing appellant's failure to object without engaging in plain error analysis, the panel opinion misapplies the "solid wall of circuit authority" doctrine. This doctrine has no application where, as here, circuit precedent permitted but did not require the district court to pursue a

particular course of action. Finally, the decision conflicts with a recent decision of the Second Circuit. Thus, the panel's decision raises questions of exceptional importance. See Fed. R. App. P. 35(a).

The panel's decision also has enormous practical consequences. Prior to the decision in Gomez, it was the regular practice in the District of Hawaii to assign jury selection in criminal trials to magistrates. Magistrates have presided over jury selection for nearly every felony trial held in that district for several years. Thus, the panel's decision will require the reversal of dozens of convictions. Indeed, the United States Attorney for Hawaii estimates that approximately 48 defendants whose juries were selected by a magistrate now have appeals pending in this Court.[2] Affidavit of Daniel Bent ¶ 4 (attached).

The retrial of the defendants whose convictions are reversed will disrupt the district courts in Hawaii. The U.S Attorney estimates that these retrials will consume approximately 73 weeks of attorney time and a corresponding amount of court time in a district with only three district judges. Id. at ¶ 4. In addition, reprosecuting these cases will drain the resources of

[2] At the date this petition has been filed, this Court already has reversed the convictions of at least five other defendants based on the decision in France. See United States v. Kuamsiri, No. 88-1432 (two defendants); United States v. Taylor, No. 88-1442, United States v. Nittayanupap, Nos. 87-1395, 88-1001 (two defendants). The government intends to file petitions for rehearing asking this Court to stay its mandate in these cases pending the disposition of this petition. In United States v. Boran, No. 86-985-03 TJH (Oct. 2, 1989), the district court in Hawaii held that France requires the reversal of convictions on collateral attack.

the United States Attorney's office and of law enforcement agencies in that district.

In short, rehearing or rehearing en banc is necessary to resolve a conflict with another court of appeals and to correct the panel's unsupported decision to excuse appellant's failure to object to the delegation of jury selection to magistrates. Failure to grant rehearing will result in the near total disruption of the courts and the law enforcement apparatus in the District of Hawaii and will confer an unjustified windfall on defendants convicted of felonies in that district. Nothing in the Gomez decision compels such a result, and this Court should grant rehearing en banc to correct the panel's interpretation of Gomez.

1. The Gomez Decision.

In Gomez, the district court assigned a magistrate to conduct voir dire pursuant to a local rule that gave magistrates authority to discharge any duty set forth in Section 636 of the Magistrates Act. Gomez and his codefendants objected to the delegation to the magistrate. Gomez, 109 S. Ct. at 2239. At the beginning of trial, the defendants renewed their objection before the district judge. After the court of appeals affirmed, the Supreme Court granted review to decide whether the assignment of jury selection to a magistrate "without the defendant's consent" violated the Magistrates Act. Gomez, 109 S. Ct. at 2239.

The Court held that Congress had not intended jury selection to be among the "additional duties" that could be delegated to

magistrates. The Court also rejected the government's argument that delegation of jury selection to magistrates could be harmless error where the defendant made an objection in the district court. It held that the defendant's "'right to an impartial adjudicator, be it judge or jury,'" is a "basic fair trial right[]." According to the Court, "'[e]qually basic is a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." Accordingly, the Court held that "harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury." 109 S. Ct. at 2248 (emphasis added).

2. The Panel's Decision Conflicts With A Decision By The Second Circuit.

In United States v. Vanwort, Nos. 88-942/943/944/945 (September 26, 1989), the Second Circuit held that a defendant's failure to object to the delegation of jury selection to a magistrate foreclosed him from obtaining reversal of his conviction on this ground. Slip op. 5877. The court relied on its earlier decision in United States v. Mang Sun Wong, No. 87-1278 (September 5, 1989), in which it held that a defendant's consent to supervision of jury selection by a magistrate precluded reversal of his conviction. In Mang Sun Wong, the Court explicitly found that "the Supreme Court limited its ruling to the situation in which a magistrate selects a jury "'despite the defendant's objection.'" Mang Sun Wong, slip op. at 7551;

see Vanwort, slip op. at 5877 (quoting Mang Sun Wong).

The decision in Vanwort directly conflicts with the panel's decision in this case. Moreover, the court's statement in Mang Sun Wong that the Supreme Court intended to limit its holding to cases in which a magistrate selected the jury over the defendant's objection directly conflicts with the panel's statement that the Court was merely "recapitulat[ing] the facts as a descriptive matter." Slip op. at 11406.

Consequently, this case satisfies the requirement of Rule 35-1 of the Rules of this Court that an appropriate ground for rehearing en banc exists if "the opinion of a panel directly conflicts with an existing opinion by another court of appeals." Because, moreover, of the practical consequences of the panel's decision, we submit that the decision "substantially affects a rule of national application in which there is an overriding need for national uniformity." For this reason alone, the petition for rehearing should be granted.

3. Appellant Waived Her Right To Have A District Court Preside At Jury Selection.

In this Court and in all other courts of appeals, it is a basic tenet of appellate procedure that the Court will not consider issues that a defendant failed to raise in the trial court. See United States v. Cloud, 872 F.2d 846, 853 n. 7 (9th Cir. 1989); United States v. Edwards, 800 F.2d 878, 884 (9th Cir. 1986). Appellant did not object to the delegation of jury selection to the magistrate; in fact, she expressed satisfaction with the manner in which it was conducted. She therefore cannot

raise the issue on appeal to this Court.

United States v. Gagnon, 470 U.S. 522 (1985), confirms this conclusion. In that case, several defendants failed to object when the district court held a conference in chambers without them, in violation of Fed. R. Crim. P. 43. This Court reversed the convictions in part because it found that the defendants had not expressly waived their Rule 43 rights. The Supreme Court summarily reversed, holding that the defendants failure to object to the conference constituted a waiver of their Rule 43 rights. 470 U.S. at 529. The Court reasoned that "[t]imely invocation" of the Rule 43 rights "could at least have apprised the District Court of the claim, and very likely enabled it to accommodate a meritorious claim." Ibid.

Like the defendants in Gagnon, appellant failed to assert a statutory trial right. Like the defendants in Gagnon, her silence should not be excused. If she had asserted the right by objecting to the delegation of jury selection to the magistrate, the district court may have conducted jury selection itself. Thus, under Gagnon, appellant waived any right to object to the delegation to the magistrate. See also Estelle v. Williams, 425 U.S. 501, 508 n.3, 512-13 (1976) (failure to object requirement that a defendant stand trial in prison garb constitutes waiver of due process violation).

4. The Panel's Decision Ignores Federal Rule of Criminal Procedure 52(b) And Settled Standards Of Appellate Review.

In the absence of an objection, only "plain" errors may be noticed on appeal. See Fed. R. Crim. P. 52(b). An error rises to the level of plain error only if it is "egregious" and will result in a miscarriage of justice if left uncorrected. See United States v. Frady, 456 U.S. 152, 163 (1982); United States v. Flores-Elias, 650 F.2d 1149, 1151 (9th Cir.), cert. denied, 454 U.S. 904 (1981).

No miscarriage of justice occurred in this case. Allowing magistrates to conduct voir dire and supervise jury selection does not undermine the integrity or reliability of a criminal trial. Indeed, in the District of Hawaii, magistrates presumably have acquired considerable expertise in selecting juries, suggesting that magistrate-selected juries are, if anything, more carefully chosen. Although the Court in Gomez held that the supervision of jury selection by a magistrate violates "a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside," it did not find that magistrates were incapable of conducting jury selection or that a jury selected by a magistrate could not be trusted to return a fair and accurate verdict. To the contrary, the Court noted that congressional expansion of the role of magistrates through the years showed that "congressional concerns regarding magistrates' abilities had decreased." Gomez, 109 S. Ct. at

NO. 89-1363

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

- vs -

DARLINA K. FRANCE,

Respondent.

CERTIFICATE OF SERVICE

I, RUTH G. FULLERTON, hereby certify that a true and exact copy of the foregoing document was duly mailed, postage prepaid to the following offices:

KENNETH W. STARR
Solicitor General
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Washington, D.C. 20530

DATED: Honolulu, Hawaii, April 2, 1990.

RUTH G. FULLERTON
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DARLINA K. FRANCE